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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 383

JOHN M. FARRELL, ET AL.,
PETITIONERS,

v.

THE COMMONWEALTH OF MASSACHUSETTS
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No.

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ROBERT N. WINSTON
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WILBUR A. BEAN
EDWARD R. NEWHALL
DEWITT J. PAUL
VINCENT E. McDONNELL
FAMILY FINANCE CORPORATION
FAMILY FINANCE MANAGEMENT CORPORATION
STATE LOAN AND FINANCE CORPORATION
STATE LOAN AND FINANCE MANAGEMENT CORPORATION
BENEFICIAL FINANCE CO.
SEABOARD FINANCE COMPANY,

PETITIONERS,

v.

THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered in the above entitled cases on June 29, 1966. The petitioners are John M. Farrell, Francis T. Glynn, Gordon J. Thomasch, Robert N. Winston, Calvert I. Bean, Wilbur A. Bean, Edward R. Newhall, DeWitt J. Paul, Vincent J. McDonnell, Family Finance Corporation, Family Finance Management Corporation, State Loan and Finance Corporation, State Loan and Finance Management Corporation, Beneficial Finance Co. and Seaboard Finance Company.

Opinions Below

The case was heard in the United States District Court for the District of Massachusetts (Sweeney, D. J.) on the petition for removal (App:) and respondent's motion to remand (App:) addressed to the face of the petition. Petitioners introduced no evidence, relying on *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 97-98. (App:). The District Court, assuming the facts stated in the petition to be true, ordered the case remanded to the state court on June 3, 1966. (App:).

A judgment of the Court of Appeals for the First Circuit affirmed the dismissal on June 29, 1966, simply citing *Georgia* v. *Rachel*, No. 147, Oct. Term, 1965, and *Greenwood* v. *Peacock*, Nos. 471 and 649, Oct. Term, 1965. The judgment is not reported, and is printed as Appendix A hereto. There was no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered June 29, 1966. No petition for rehearing was filed, because there had been filed, by leave of the Court of Appeals, a supplemental brief in companion cases,* discussing the opinions in the *Rachel* and *Peacock* cases, before the decision of the Court of Appeals. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. May a discriminatory state grand jury procedure constitute a denial of federal equal civil rights "in the courts of [the] State" within the meaning of 28 U.S.C., §1443 (1)?
2. May a past denial of federal equal civil rights at the grand jury stage of a state criminal prosecution support pre-trial removal under 28 U.S.C., §1443 (1)?
3. (a) Is the Equal Protection Clause of the Fourteenth Amendment a "law providing for . . . equal civil rights" within the meaning of 28 U.S.C., §1443 (1)?
   (b) Whether an indictment obtained by application of a state statute authorizing counsel for a legislative "crime commission" to present to a grand jury evidence obtained by such commission violates the Equal Protection Clause of the Fourteenth Amendment, where such presentation is in violation of rights uniformly accorded all others similarly situated?
4. May a state denial of non-racial federal equal civil rights support removal under 28 U.S.C. §1443 (1)?

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* The companion cases were *Pratt et al.* v. *Commonwealth* and *Barber et al.* v. *Commonwealth*, which are referred to in the judgment of the court below (App. 27) and are now pending in this court by reason of a consolidated petition for certiorari filed July 12, 1966, and docketed as No. 335.

Constitutional Provisions and Statutes Involved

The Constitution of the United States, Amendment 14:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. §1443. Civil Rights Cases:

> "Any of the following civil actions or criminal prosecutions, commenced in a State court, may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; . . ."

Massachusetts Resolves, 1962 — Ch. 146:

> *Resolved,* That an unpaid special commission to consist of seven members appointed by the governor is

hereby established to investigate and study as a basis for legislative action the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels, the existence of conditions which tend or may tend to prevent or interfere with the proper enforcement of the laws relating thereto, the existence of physical, legal and policy limitations on the powers and functions of those charged with the duty of enforcement of said laws and the extent to which the power of the government of the commonwealth in relation to the enforcement of said laws may or should be properly exercised at state and local levels.

No member shall hold any public office except that of justice of the peace or notary public or be a member or employee of any political committee. Not more than four of said members shall at any one time be members of the same political party. No person who has been convicted of a felony, gaming offense or any misdemeanor involving moral turpitude, nor any member of the immediate family of any such person, and no person who has served as a member of the special commission established under chapter one hundred of the resolves of nineteen hundred and fifty-three and revived and continued under chapter one hundred and forty-seven of the resolves of nineteen hundred and fifty-five shall be eligible for appointment to the commission. The governor shall fill any vacancy in the commission but a vacancy shall not affect its powers and duties. The governor shall from time to time designate one of the members as chairman.

The commission shall request the commissioner of public safety to assist it in its investigation and study and he shall furnish any information in his possession which is so requested and he shall assign such assist-

ants and investigators to said commission as it may request. The commission may require the co-operation of all agencies of state and local governments.

The commission may require by summons the attendance and testimony under oath of witnesses and the production before it of books and papers relating to any matter being investigated by it pursuant to the provisions of this resolve. Such a summons may be issued by the commission only upon a vote of the commission and shall be served in the same manner as summonses for witnesses in criminal cases issued on behalf of the commonwealth and all provisions of law relative to summonses issued in such cases shall apply to summonses issued under this resolve so far as applicable. Any justice of the supreme judicial court or of the superior court may upon application by the commission compel the attendance of witnesses summoned as aforesaid and the giving of testimony under oath before the commission in furtherance of any investigation under this resolve in the same manner and to the same extent as before said courts.

The commission shall establish rules of procedure governing the conduct of its hearings which shall be made available in printed form to each witness prior to his testimony. Witnesses shall have the right to be represented by counsel and shall before testifying be sworn. Witnesses shall testify only at private hearings and the same provisions with reference to secrecy which govern proceedings of a grand jury shall govern all proceedings of the commission.

Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such evidence which has come to the attention of the commission as in the opinion of

the commission warrants such presentation or submission.

The commission shall report to the general court annually on or before the first Wednesday in December in each year the results of its investigations and study and its recommendations, if any, together with drafts of legislation necessary to carry such recommendations into effect by filing the same with the clerk of the senate and shall file a final report not later than the last Wednesday in June, nineteen hundred and sixty-five. The commission shall also file a copy of each such report with the governor.

Approved July 27, 1962.

Massachusetts Constitution:

Article XXX. Separation of legislative, executive and judicial departments.

"XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

Statement of the Case

Petitioners have not sought removal in order to challenge the traditional and usual administration of the criminal law in Massachusetts.

With the advent in 1962 of the legislative "special commission relative to crime and corruption" with statutory

authority that "its counsel shall present to a grand jury for its action" whatever is decided "by order of the commission" (Mass. Resolves 1962, Ch. 146) indictments rained on the Massachusetts political and business community. (The growth of legislative committees delving into crime has spread from the more celebrated Congressional Committees into State, County and City "Crime Commissions". Their scope is so broadening that they have been called "the third force".)

Petitioners were indicted by a special pattern, not followed in grand jury proceedings afforded to others, of a legislative commission which was given control over the prosecutorial machinery, and its own Special Grand Jury to hear its evidence. It was this legislative commission's counsel who presented the evidence, and wrote the 129 indictments against these and other defendants, including state officials. (App. 36)

The legislative commission was created by Mass. Resolves 1962, Ch. 146, quoted in full at p. 4, supra. It assumed the name of the Massachusetts Crime Commission. Its term expired June 30, 1965. The authorizing legislation provided, in part:

> "Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such evidence which has come to the attention of the commission as in the opinion of the commission warrants such presentation or submission."

Seizing on this unique authority, the Crime Commission itself presented its evidence to a grand jury by the device of each commission counsel being given a letter as Special

Assistant Attorney General with power limited to presenting Crime Commission evidence.[1] (App. 35) The Crime Commission was never anything more than an arm of the Legislature. (App. 31)

This was an absolutely unique statutorily authorized presentation of evidence to a grand jury *by the Legislature,* which grand jury proceeded to indict the petitioners. (App. 36) No other Massachusetts citizen before or since has been by statute subjected to indictment by the Legislature[2] — in every other case the indictment is procured by either the Attorney General or a District Attorney. *Opinion of the Justices,* 232 Mass. 601; Accord, *Attorney General* v. *Pelletier,* 240 Mass. 246; *Commonwealth* v. *Harris,* 231 Mass. 584.

The Legislature's Crime Commission ignored the regular grand jury then setting in Suffolk County and had a *Special* Grand Jury empanelled. (App. 33). Special grand juries in Massachusetts are authorized, G.L. (Ter. Ed.) c. 277, paragraph 2A, only "to hear, consider and report,"[3] yet the Crime Commission's Special Grand Jury indicted these defendants—the first special grand jury in the history of the Commonwealth to return an indictment. (App. 34)

The Crime Commission evidence (other than some short summaries given to the Attorney General's staff) remained

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[1] Attorney General Brooke was induced to accept this blanket transfer of the Attorney General's prerogatives at conferences which the Chairman of the Crime Commission started even before Mr. Brooke took office as Attorney General. (App. 33)

[2] The allegations show such control and interaction on the same witnesses, concurrently, by Crime Commission hearings and grand jury hearings, each managed by the same Crime Commission lawyers, and such writings of both substance and names in the 129 indictments by the Crime Commission, that one may validly state that the legislative Crime Commission, in reality, the grand jury only nominally, did the indicting.

[3] A "report" is not, of course, an indictment. Kuh, *The Grand Jury "Presentment:" Foul Blow or Fair Play,* 55 *Colum. L. Rev.* 1103 (1955).

in the private law office of the legislative commission counsel, and was by him doled out to the Special Grand Jury. (App. 36)

The interviewing of witnesses for the Special Grand Jury was carried out by the legislative commission counsel, either in his law office or at the Commission's office, and it was all paid for by the legislative commission. (App. 36)

During the deliberations and voting of 129 indictments by the Special Grand Jury on May 7th and May 8th, there were present Marshall Simonds, counsel for the legislative commission, Mr. Brooke, the Attorney General, Walter Jay Skinner, Chief of the Criminal Division, Herbert F. Travers, Jr., and Richard Backman, Assistants. All five of these persons were simultaneously present before the grand jury. (App. 36)

During the deliberation and votes, the indictments were presented in groups or packages. The groups or packages were identified by summary language which assumed proof of crimes before the special grand jury. The indictments for conspiracy were read to the grand jury in toto and were voted as a whole; that is, the grand jury did not vote separately to name as defendants each person named as a defendant in the conspiracy indictments, and they did not vote individually not to name certain conspirators as defendants, but rather as co-conspirators, not defendants. This judgment was made by persons other than the grand jury. The conspiracies were determined, described, and detailed by persons other than the grand jury. The substantive indictments were read only in samples representative of the various classes of crimes charged, and other substantive indictments were summarized for the grand jury by attorneys general before voting. This included blanket substantive indictments containing multiple defendants. (App. 36)

The Special Grand Jury was drawn from a list of jurors

chosen in deliberate and intentional violation of the statutes of Massachusetts. (App. 34)

These petitions for removal plainly alleged (and there was no denial by the Commonwealth) that indictment by presentation of evidence to a grand jury by a legislative committee and the other unique procedures which produced these indictments is not the rule applied generally to others in Massachusetts. (App. 31, 37)

State Court Proceedings

No review of the judgment of a state court is sought. The federal constitutional questions were raised by plea in abatement in the state court under an explicit reservation of the right to have them decided by the Federal Courts. There is a serious question in Massachusetts procedures as to whether a denial of a plea in abatement is reviewable at all on appeal unless the defendant stands on his plea and appeals from the conviction and sentence imposed immediately upon denial of the plea (without any trial on the merits). But this is not assigned as grounds for removal, because *all* defendants run that risk in the present state of Massachusetts law.

Jurisdiction Below

Jurisdiction below was based upon 28 U.S.C. §1443 (1).

Reason For Granting the Writ

Important Questions of Statutory Construction and Federal Jurisdiction Are Presented

On June 20, 1966, this Court announced its decisions in *Georgia* v. *Rachel*, No. 147, and *City of Greenwood* v. *Peacock*, Nos. 147 and 649, Oct. Term, 1965. Although in

Peacock, id. at 23, the Court stated that "we decline to repudiate" the line of cases construing the removal statute from *Strauder* v. *West Virginia,* 100 U.S. 303, (1880), to *Kentucky* v. *Powers,* 201 U.S. 1 (1906), both *Rachel* and *Peacock* have been widely and erroneously interpreted as being more restrictive than those earlier cases, and so limiting the application of 28 U.S.C. §1443 (1) as to render it, for all practical purposes, of scant utility.

The questions presented by this Petition afford the Court an opportunity to resolve issues alluded to, but not squarely presented by the facts, in the recent *Rachel* and *Peacock* cases.

1. WHETHER A DISCRIMINATORY STATE GRAND JURY PROCEEDING MAY CONSTITUTE A DENIAL OF FEDERAL EQUAL RIGHTS "IN THE COURTS OF [THE] STATE" WITHIN THE MEANING OF 28 U.S.C. §1443 (1)

In *Peacock,* the Court emphasized that "no federal law confers an absolute right on private citizens . . . to obstruct a public street [etc.]" nor "confers immunity from state prosecution on such charges". It then proceeded to hold that, to support removal, the defendant must allege the denial of "a specified federal right *'in the courts of* [*the*] *State'* " (emphasis added), and that the illegal and corrupt motivation of state administrative officials in originally bringing the charges is not such a denial occurring "in the courts of [the] State". *Id.* at 18-19.

On the other hand, as the Court recognized in *Rachel, id.,* at 16-17, *Strauder* squarely held that removal should have been granted a Negro indicted for murder where members of his race were excluded from jury service pursuant to a state statute that permitted only white male persons to serve on a grand jury or petit jury. No federal statute, of course, conferred an "absolute right" to com-

mit murder or granted "immunity from state prosecution on such charges". *Peacock*, at 18. Therefore, there is at least an apparent area left open for removal even where there is no federal substantive law to permit or immunize the conduct for which the state brought the prosecution. Accordingly, there must be an area of *procedural* rights, a denial of which can trigger removal.

In the instant case, the defendants allege some nine separate violations of their equal civil rights, not in the motivation of the state officers originally investigating and bringing the charges, as in *Peacock, id.*, at 19, but in an invidiously discriminatory indictment process. The alleged denials of equal civil rights arise from both the application of a facially unconstitutional state statute and from practices employed by state officers in obtaining indictments sought to be removed. Postulating the grand jury as an arm of the court, it follows that the denial of defendants' equal civil rights, occurred, as in *Strauder*, "in the courts of [the] State".

Moreover, as the Petition for Removal alleges (App. 30), the denial of equal civil rights in the courts of the state are accomplished facts. Accordingly, there is no occasion, as in *Peacock*, for "the judges of the federal courts to put their brethren of the state judiciary on trial," since, as *Peacock*, at 19, interpreted *Rachel*, defendants' "rights will inevitably be denied by the very act of bringing [them] to trial in the state court" on indictments already returned by an arm of such court in past violation of their equal federal civil rights.

Finally, since the wrongs complained of will not be issues at their trial, it cannot be contended here, as in *Peacock, id.* at 19, that defendants may yet win vindication of their rights at their trial in the state court.

Therefore, although there is here no collision between *substantive* state and federal law, as presented by *Rachel*,

where federal law "substitute [d] a right for crime", *id.* at 24, the instant petition presents a *procedural* conflict comparable with that in *Strauder* but, unlike that in *Peacock*, having already occurred at the *judicial* stage of the prosecution. Thus, it affords the Court an opportunity to cast a new light on the vast area of procedural conflicts between state and federal law. More particularly, the instant petition presents two vitally important questions left open by *Rachel* and *Peacock:*

(1) Whether procedural conflicts between state and federal law in the area of equal civil rights may support removal at all under 28 U.S.C. §1443 (1), and, if so,

(2) At what point does the denial of procedural equal civil rights cease to be the act of state officials and become a denial "in the courts of such State".

We think that the first question will elicit an affirmative response from this Court and that the point referred to in the second question is reached, at the very latest, when state officers begin their presentation of evidence to the grand jury. In any event, we submit that both questions need the immediate attention of this Court if the lower courts are to receive the guidance in the area of denial of equal civil rights by denial of procedural rights,[4] as distinguished from substantive rights. This guidance was expected, but not forthcoming, in *Rachel* and *Peacock.*

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[4] The denial by a state of a grand jury procedure attended with all procedural safeguards which are afforded uniformly to all other persons is a violation of the Equal Protection Clause. *Hill* v. *Texas*, 316 U.S. 5400, 406 (1942); see also opinions of Mr. Justice Douglas and Mr. Justice Black in *Beck* v. *Washington*, 369 U.S. 541, 558, 579 (1962).

2. In Addition to the Existence of a Statute Which on Its Face Denies Petitioners Their Equal Civil Rights, These Petitioners Have Alleged in Their Petitions Accomplished Invidious Discriminatory Practices Which Denied Them Equal Civil Rights.

Both the majority (*Rachel,* Page 5; *Peacock,* Page 26) and the minority (*Peacock,* Page 15) agree that Congress deliberately left to the courts clarification of the removal statute.

One of the areas of needed clarification is the scope of the so-called *Strauder-Rives* doctrine: May removal be based only upon denial by statute, or may it be based upon state practices?

In *Rachel,* the majority, at page 19, the *Strauder-Rives* emphasis upon "a law of general application," but, at Page 23, notes that, in *Rives* itself, the Court said a statutory denial is "not exclusively" the denial for which removal might be had. In *Rachel,* the Court does not criticize the statute—an apparently common trespass statute—but says the decision is to turn upon the facts of the *practices* in the application of the statute. Indeed, the four members of the Court who joined the concurring opinion in *Rachel* interpret that case to hold that there need *not* be a showing of "a facially unconstitutional state statute or constitutional provision." (*Peacock* dissent, footnote 14, page 15.)

In *Peacock,* the majority seems more insistent on a statute, at page 19, yet probably also allows past practices to suffice if they can be proved to inhere in "the very act of bringing the defendant to trial in the state court." (Page 19). This distinction is said by the dissenters in *Peacock* to be "none too clear" in footnote 14, page 15.

The petitioners believe there still remains clarification to come, but under a fair reading of *Rachel* and *Peacock,* the petition for removal was sufficient to require the filing

of an answer by the Commonwealth and, if necessary, the taking of evidence on what the actual practices were here, since the practices complained of met even the *Peacock* standard that they be past practices which inhered in the already accomplished "very act of bringing" these petitioners into court.

In any event, petitioners have shown a facially unconstitutional state action: The Massachusetts Resolve granting to a legislative commission the power to present cases before a Grand Jury to secure indictments, contrary to the grand jury process afforded all others in Massachusetts.

In *Rachel* it is said, at p. 19, the federal courts can grant removal if a denial of equal civil rights can be predicted and:

> "A state statute authorizing the denial affords an ample basis for such a prediction."

In *Peacock* it is stated, at p. 19, that removal can be based upon a denial "by reason of the operation of a pervasive and explicit state or federal law . . .".

These petitioners assert that they have a right to have the cases removed in the absence of the Commonwealth's denying any fact in the removal petition.

3. The Rachel and Peacock Cases Do Not Decide the Important Question Whether the Equal Protection Clause of the Fourteenth Amendment Is a "Law Providing for the Equal Civil Rights of Citizens" Within the Meaning of 28 U.S.C. §1443 (1).

In *Peacock,* the Court decided that the rights to free speech given by the First Amendment cannot be considered to be rights arising under a law providing for "equal civil rights." (*Id.* p. 16) It is stated that the rights of

free speech were civil rights but not civil rights providing for equal treatment.

The majority in *Rachel* held at p. 11:

> "Thus the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal . . ."

The majority, however, did not decide the Equal Protection question. Indeed, the majority explicitly declined at page 17, to "pursue to a conclusion" exactly what rights were included in the catalogue of "equal civil rights", a denial of which would be cause for removal.

In the dissenting opinion in *Peacock*, a reading of footnote 4 at page 7 indicates that Mr. Justice Douglas and his three colleagues on the dissent might be willing to accept the limitation established by the majority that "pure First Amendment claims" do not involve "equal civil rights." The dissent goes on, however, to very explicitly indicate that the Equal Protection Clause would surely be included within any definition of "equal civil rights." Mr. Justice Douglas says in footnote 4 at page 7:

> "I doubt that any meaningful distinction could be drawn for removal purposes between, for example, rights secured by 42 U.S.C. par. 1981, and those guaranteed by the Equal Protection Clause, which largely reiterated par. 1981 in constitutional terms. But it is unnecessary, on my view of these cases, to settle this question. I therefore do not reach the highly questionable propositions relied upon by the majority in restricting the scope of rights which §1443 (1) encompasses."

Since Mr. Justice Douglas and his three colleagues were part of the unanimous Court in *Rachel* and their concurring opinion took no exception on this question, the foregoing quotation makes it plain that they did not regard *Rachel* as excluding the Equal Protection Clause from "equal civil rights," even though, as we have noted, *Rachel* did exclude "the Due Process Clause of the Fourteenth Amendment." (p. 11).

Besides the majority's significant stopping short of eliminating all Fourteenth Amendment rights from the protection of the removal statute, there is language in the majority opinion in *Rachel* consistent with the view that the entire Court is likely to accept the Equal Protection Clause as within the scope of "equal civil rights." At page 9 of the majority opinion, it is said:

> "In spite of the potential breadth of the phrase 'any law providing for . . . equal civil rights,' it seems clear that in enacting section 641, Congress intended in that phrase only to include laws *comparable in nature* to the Civil Rights Act of 1866." (emphasis added).

Certainly the Fourteenth Amendment which was passed for the explicit purpose of making constitutional the Civil Rights Act of 1866 comes within the definition of a law "comparable in nature to the Civil Rights Act of 1866." The expression of identity used by Mr. Justice Douglas (*Peacock*, footnote 4, page 7, supra) is that the Equal Protection Clause "largely reiterated par. 1981 in constitutional terms." Mr. Justice Stewart equates 1981 with the Civil Rights Act of 1866 in footnote 12, page 8, of *Rachel*. The circle is complete.

The majority in *Rachel*, at page 11, holds that §1443 (1) is intended to protect those "rights that are granted in terms of equality." The Court is at this point quoting *New York* v. *Galamison*, 342 F.2d 255, 269, 27. *Galamison*

was construed by Professor Amsterdam as expressly including the Equal Protection Clause of the Fourteenth Amendment as "explicitly guaranteeing equality of rights" and as "a law providing for equal civil rights." (See, as to Amsterdam, footnote 6 infra, his treatment of *Galamison* is at 113 U. Pa. L. Rev. 864-874. His treatment of *Galamison* supports Petitioners' views, at 870, 871, 873.)

It is therefore our reading of these most recent decisions of this Court that Fourteenth Amendment equal protection rights are such "equal civil rights" as are contemplated by the removal statute. They make no holding to the contrary, but are consistent with petitioners' position and often cite *Strauder* v. *West Virginia*, 100 U.S. 303 (1879), which apparently held the Equal Protection Clause to be a "law" within the meaning of §1443.

A specific ruling is needed on the right of removal for violation of the Equal Protection Clause because (a) *Rachel* and *Peacock* do not decide it; and (b) *Strauder* is subject to the *caveat* in *Peacock* that "all the language and all the reasoning" of *Strauder* to *Powers* is not necessarily approved by this court (p. 22).

4. In a Case Involving Deprivation of Rights Under the Equal Protection Clauses, the Removal Statute Would Have To Be Color Blind, and Available to Whites as Well as Negroes.

While the removal statute has since Reconstruction days been utilized often by Negroes, its provisions are—as they must be—color blind. They apply to "any person" and U.S. 1 (1906), specifically rules that the removal statute applied to any criminal defendant who alleged that he had been denied equal protection of the laws. The case did not involve racial discrimination, but the claim that the defendant was prejudiced from the systematic exclusion of Republicans from juries. On pages 32-33 the Court said:

"The cases to which we have adverted had reference, it is true, to alleged discriminations against Negroes because of their race. But the rules announced in them equally apply where the accused is of the white race. Section 641 (the fore-runner of §1443), as well as the Fourteenth Amendment of the Constitution, is for the benefit of all of every race whose cases are embraced by its provisions and not alone for the benefit of the African race."

This only echoes, actually, an earlier but equally clear holding of the Court in *Strauder* v. *West Virginia,* 100 U.S. 303 (1879). In that case a Negro defendant sought to remove his murder prosecution to the Federal court on the ground that he was denied equal protection of the law by a West Virginia statute forbidding Negroes to serve on juries. The Court held the removal proper, saying on pages 308, 310 and 312:

"That the West Virginia Statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, . . . we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment.

". . ."

". . ."

". . ."

"The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property.

". . ."

". . . But there is express authority to protect the rights and immunities referred to in the 14th Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right of immunity, is a law providing for the removal of his case from a State Court, in which the right is denied by the state law, into a Federal Court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Section 641 is such a provision."

In the majority opinion in *Peacock,* the court declined to repudiate *Kentucky* v. *Powers* and *Strauder* v. *West Virginia* (pp. 23-23).

Any violation of *any* person's right to equal protection of the laws is removable to the Federal Courts. *Steele* v. *Superior Court,* 164 F.2d 781 (9th Cir. 1948).

The fact that the removal statute has over the years appeared in the reported cases mainly as an instrument of the Negro's drive for equality is a reflection of history, not of law. The denial of equal protection to a Negro is a violation of his constitutional rights, not because he is a Negro, but because he is a "person", who stands equal before the law. *Collins* v. *Walker,* 329 F.2d 100, 105 (5th Cir. 1964).

It is significant that the concurring minority in *Rachel* although they referred to state action based on "racial reasons" *id.* at 2 (concurring opinion), is the same group of four justices who, dissenting in *Peacock*, state, *id.* at 5:

> ". . . But the minorities who are the subject of repression are not only those who espouse the cause of racial equality. Jehovah's Witnesses in many parts of the country have likewise felt the brunt of majoritatian control through state criminal administration. Before them were the labor union organizers. Before them were the Orientals. It is in this setting that the removal jurisdiction must be considered."

The above quotation is a plain statement that removal can be granted to anyone whose "equal civil rights" are violated even if those rights are not racial, for example, the equal civil rights of labor union organizers have nothing to do with the *race* of the organizers being harassed.

Similarly, footnote 8, at page 9, of the *Peacock* dissent gives two examples of prohibited discrimination, only one of which is a racial discrimination:

> "Administration of a law which appears fair on its face violates the Equal Protection Clause if done in a way which is racially discriminatory (*Yick Wo* v. *Hopkins*, 118 U.S. 356) or which prefers the proponents of certain ideas over others (*Nietmotko* v. *Maryland*, 340 U.S. 268, 272; *Cox* v. *Louisiana*, supra at 553-558; and see *id.*, at 580-581 (BLACK, J., concurring). Both standards combine in the case of discriminatory enforcement directed against civil rights demonstrators. And see 42 U.S.C. §1981 (1964 ed.)

Rachel and *Peacock* were removal petitions brought by Negroes alleging state prosecutions based on racial prejudices. In *Rachel* the conduct charged was found to be potentially federally protected; in *Peacock*, it was not. Statements in *Rachel* concerning removal because of racial inequality are limited by the facts of that case and by the fact that the Court expressly did not decide the scope of the various bases for removal jurisdiction.

The language of *Rachel*, at p. 11:

> "the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality."

should be read as reading:

> "the phrase 'any law providing for . . . equal civil rights' must [at the very least] mean any law providing for specific civil rights stated in terms of racial equality, such as the Civil Rights Act of 1964 here relied upon."

And when the Court goes further and adopts *New York* v. *Galamison*, 342 F.2d 255, 269, 271:

> "When the removal statute speaks of 'any law providing for equal rights' it refers to those laws that are couched in terms of equality, such as the historic and the recent civil rights statutes . . .",

it can be read to say it

> "refers to those laws that are couched in terms of equality, such as the historic [Civil Rights Act of 1866

or its matching Fourteenth Amendment Equal Protection Clause introduced Jan. 16, 1866] and the recent civil rights statutes . . .'"[5]

That such a reading is fully justified is borne out by the identity of timing, policy, and effect of the Civil Rights Act of 1866 and the Fourteenth Amendment Equal Protection Clause demonstrated in *Hurd* v. *Hodge,* 334 U.S. 24, 32 (1947).

A parallel of today's problem of whether the removal statute is limited to racial questions is found in the historical development of this Court's attitude towards the problem of whether the Fourteenth Amendment was limited to racial questions. Originally, it was so limited in the *Slaughter-House Cases,* 16 Wall, 36 (1872). This restrictive (interpretation (based largely on the legislative history of the Fourteenth Amendment) was rejected by the minority in a cogent dissenting opinion by Justice Field.[6] This dissenting opinion eventually became the Court's holding that the Fourteenth Amendment was clearly couched in language of general applicability to rights whether racial or not. This has produced a line of cases holding that upon proof of denial by a state to some defendants of rights which it accords to all there has been made out a case of denial of the equal protection of the law guaranteed by the Fourteenth Amendment. *Griffin* v. *Illinois,* 351 U.S. 12, 17 (1955); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1952); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951); *Caldwell* v. *Texas,* 137 U.S. 692, 697 (1891); *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-4 (1886).

We point out as to the standing of some of the peti-

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[5] *Galamison;* here being adopted, expressly included the Equal Protection Clause; Amsterdam, at p. 873.

[6] *Rachel* cites this dissenting opinion of Justice Field at footnote 14, page 9.

tioners here: there can be no argument that the corporate defendants are entitled to invoke the constitutional guarantees of equal protection of the laws. *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Liggett Co.* v. *Lee*, 288 U.S. 517 (1933); *Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515 (1929).

It has become historically plain from the development of the law on the Equal Protection Clause that those who rely upon the Equal Protection Clause enjoy "equal civil rights" belonging to those of all colors. They do not have to prove a denial of racial rights but a denial of a right protected by the Equal Protection Clause. *Rachel* and *Peacock* must be read with their facts, and their concern with the 1964 law providing for equal civil rights; they do not deny to any white person the long settled equal civil rights of the Equal protection Clause.[7]

Petitioners concede that in both *Rachel* and *Peacock* there are constant references to the racial discrimination questions, but just what is the full extension of the "equal civil rights" which are protected was intentionally not developed by *Rachel* (page 17), and *Peacock* did affirm (page 23) the very cases upon which we rely to show the rights which are protected by the removal statute are broader than merely racial rights.

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[7] The "remarkably original and comprehensive" (*Rachel*, footnote 4) article by Amsterdam, "Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial," 113 *U. Pa. L. Rev.* 793 (1965) frequently notes the Equal Protection Clause of the Fourteenth Amendment in describing equal civil rights to protect which removal should be permitted: p. 796, 800, 804 and footnote 41, 827, 836, 851 (so construing *Strauder*), 852, 861, 863, 869, 873.

He points out that the returned Union soldiers were being shabbily treated in the Courts of the border states, so rights of removal for them were necessary. Id. at 823-5. Obviously they were usually white; the discrimination was not at all on *racial* grounds.

Conclusion

For the foregoing reasons we ask that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

DONALD S. DAWSON, ESQ.,
Counsel for Petitioners

Appendix A

United States Court of Appeals
For the First Circuit

No. 6750

JOHN M. FARRELL, ET AL.,
PETITIONERS, APPELLANTS,
v.
COMMONWEALTH OF MASSACHUSETTS
RESPONDENT, APPELLEE.

JUDGMENT
June 29, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was submitted on briefs and oral arguments in 6734*, Pratt et al. v. Commonwealth of Massachusetts, and 6735*, Barber v. Commonwealth of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed. *Georgia* v. *Rachel,* U.S. (6/20/66); *City of Greenwood* v. *Peacock,* U.S. (6/20/66).

By the Court:
(s) ROGER A. STINCHFIELD,
Clerk.

*A consolidated petition for certiorari seeking review of the judgments entered in No. 6734 and No. 6735 was filed in this Court on July 12, 1966, and docketed as No. 335.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No.

COMMONWEALTH OF MASSACHUSETTS

v.

JOHN M. FARRELL, FRANCIS T. GLYNN, GORDAN J. THOMASCH, ROBERT N. WINSTON, CALVERT I. BEAN, WILBUR A. BEAN, EDWARD R. NEWHALL, DEWITT J. PAUL, VINCENT E. MCDONNELL, FAMILY FINANCE CORPORATION, FAMILY FINANCE MANAGEMENT CORPORATION, STATE LOAN AND FINANCE CORPORATION, STATE LOAN AND FINANCE MANAGEMENT CORPORATION, BENEFICIAL FINANCE CO. and SEABOARD FINANCE COMPANY

PETITION FOR REMOVAL OF CRIMINAL PROSECUTIONS

1. Jurisdiction for this petition is in 28 U.S.C. § 1443, 1446.

2. The respective petitioners are the named defendants in the above entitled criminal prosecutions presently pending in the Suffolk County Superior Court for The Commonwealth of Massachusetts, as follows:

a. John M. Farrell, named in Indictments numbered 11898, 11900, 11903, 11904, 11905, 11906, 11908, 11909, 11910, 11921.

b. Francis T. Glynn, named in Indictments numbered 11898, 11900, 11903, 11904, 11905, 11906, 11908, 11909, 11910, 11966, 21707.

c. Gordon J. Thomasch, named in Indictments numbered 11903, 12031, 11898, 11900, 11906, 11907, 11910.

d. Family Finance Corporation named in Indictments numbered 11898, 11900, 11903-11906, 11908-11910, 11920.

e. Family Finance Management Corporation named in Indictments numbered 11898, 11900, 11903-11906, 11908-11910, 11919.

f. Robert N. Winston, named in Indictments numbered 11898, 11903, 11905, 11906.

g. Calvert I. Bean, named in Indictment numbered 11908.

h. Wilbur A. Bean, named in Indictments numbered 11898, 11903, 11904, 11905, 11906, 11909.

i. State Loan and Finance Corporation, named in Indictments numbered 11898, 11900, 11903, 11904, 11905, 11906, 11909, 11910, 12029.

j. State Loan and Finance Management Corporation, named in Indictments numbered 11898, 11900, 11903, 11904, 11905, 11906, 11909, 11910, 12030.

k. Beneficial Finance Co. allegedly named in Indictments numbered 11898, 11900, 11901, 11903, 11904, 11905, 11906, 11908, 11909, 11910.

l. DeWitt J. Paul and Edward R. Newhall, each named in Indictment 11908.

m. Vincent E. McDonnell is named in Indictments numbered 11898, 11903, 11905, and 11906.

n. Seaboard Finance Company is named in Indictments numbered 11898, 11903, 11905, 11906.

3. A copy of each of said Indictments is attached hereto, filed herewith, and collectively marked "A".

4. None of said Indictments has yet been brought to trial.

5. On April 28, 1966, and April 29, 1966, five other named defendants, in some indictments separately and collectively named together with the several petitioners, filed a removal petition in this Court. Said defendants are

Household Finance Corporation, Liberty Loan Corporation, James S. Pratt, Lyle S. Woodcock and Morris Garfinkle. Said petition was docketed as Civil Action 66-317-S. Another such defendant, Nathaniel M. Barber, filed a separate removal petition, docketed as Civil Action 66-319-S.

6. On May 3, 1966, Mr. Justice Quirico of the Superior Court of the Commonwealth of Massachusetts entered an Order for Trial of your petitioners on all indictments including those subject to the removal petition of the defendants' named in paragraph 5 herein. A copy of said Order is annexed hereto, filed herewith and marked "B".

7. Removal is sought to protect the rights guaranteed to the petitioners under the equal protection clauses and the privileges and immunities clauses of Section 1, Fourteenth Amendment to the Constitution of the United States, and to protect the rights guaranteed to the petitioners under the laws of the United States providing for the equal civil rights of citizens of the United States and all persons within the jurisdiction thereof.

8. The petitioners have been denied and cannot enforce in the Courts of the Commonwealth of Massachusetts rights under the Constitution and laws of the United States providing for the equal civil rights of citizens of the United States and all persons within the jurisdiction thereof, in that, among other things, the Commonwealth of Massachusetts, by statute and current usage and practice, is maintaining and encouraging a policy of willful and systematic discrimination against the petitioners in the investigation, institution and prosecution of the so-called small loans cases, and is subjecting the petitioners to punishments, pains and penalties of a kind different from that to which other citizens are subjected, as will hereinafter be more fully stated.

9. The corporate petitioners are Delaware corporations.

The individual petitioners are residents of states other than Massachusetts. The petitioners have been indicted, under the unique procedures hereinafter set out, for alleged offenses relating to the corruption of Massachusetts public officials.

10. All of the indictments herein were sought and returned under special and unique methods, applied to these petitioners and not others, which special and unique methods may generally be described as a prosecution conducted by a commission of the legislative branch of the Commonwealth of Massachusetts, staffed by employees of the legislative branch, and paid for out of funds especially appropriated by and for the legislative branch, which prosecution has led to indictments prepared and directed by legislative employees and returned by a so-called special grand jury, especially created to hear evidence gathered and presented by legislative employees.

11. The legislative commission referred to above was created by a Resolve of the Massachusetts General Court in 1962, Chapter 146 (a copy of which is filed herewith and marked "C") and immediately adopted the name of "Massachusetts Crime Commission". The initial, and subsequent, appropriations for its work totalled $640,000. The Massachusetts Crime Commission in all of the matters herein described took *de facto* control of the entire investigative and prosecutorial steps and procedures involved in the criminal prosecutions herein sought to be removed. It effectively assumed control of prosecutions of these petitioners in a manner not applied to other persons investigated or charged with crime, who are accorded the protections of the usual customs and practices of law enforced in Massachusetts.

12. The facts and circumstances surrounding the investigations and indictments are as follows:

(a) By the Resolves of 1962, Chapter 146, the legis-

lature of Massachusetts authorized the appointment of a seven-member commission (hereinafter designated the Crime Commission or Commission) "to investigate and study as a basis for legislative action the existence and extent of organized crime within the Commonwealth and corrupt practices in government at state and local levels . . ." The Resolve further provided that "[u]pon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such evidence which has come to the attention of the commission . . . ." The combination of powers given the Commission was entirely without precedent.

(b) The Commission was organized in October, 1962, with Alfred Gardner (hereinafter called Gardner) as chairman, who, acting in the name of the Commission, immediately assumed the exercise of powers never before given in the Commonwealth of Massachusetts.

(c) From the beginning, the Commission conceived one of its functions to be the obtaining of indictments and the securing of convictions. The prosecution of the defendants was undertaken by the Commission not to vindicate offenses committed against the state but to demonstrate to the legislature the need for the adoption of the Commission's recommendations for legislation. Accordingly, it constituted itself a unique law enforcement body whose principal purpose was to punish those whom it singled out as responsible for corruption in state government.

(d) In June, 1963, as one of its areas of inquiry, the Commission voted to investigate the activities of the Massachusetts Department of Banking and Insurance, which later became known as the small-loans investigation.

(e) At the same time, it employed, and placed in charge of the investigating team for small-loans, Marshall Simonds (hereinafter called Simonds), an attorney who

was, at the time and at all relevant times up to and including the dates on which indictments were returned against petitioners, employed by a large Boston law firm representing financial institutions and banks who were, and are, in the matter of small loans, competitors of the petitioner corporations and whose interests in that respect are antagonistic to petitioners.

(f) Simonds began working for the Commission in August, 1963. The Commission paid Simonds over $40,000, for his services, all of which money was remitted by Simonds to the law firm from which he continued to receive his regular salary.

(g) Between August, 1963, and January 27, 1964, Simonds spent most of his working time as head of the small-loans investigation. In that capacity he interrogated witnesses both privately and at formal hearings before the Commission, checked documentary evidence, determined whether subpoenas for witnesses should issue in the Commission's name, enforced testimony of a recalcitrant witness by appearing as attorney for the Commission in a suit in equity to compel his testimony, supervised other staff members participating in the investigation, and developed a plan for prosecuting the petitioners.

(h) Meanwhile, from November, 1962, and thereafter from time to time, Chairman Gardner discussed with the Attorney-General-elect, later Attorney General Brooke, plans for prosecution based upon the Commission's investigation. After agreement with Gardner, Brooke made a written request to the Chief Justice of the Superior Court for the convening of a special grand jury, under the provisions of G.L. c. 277, § 2A, "to hear, consider and report on such matters as the Attorney General may present." Gardner appeared with Brooke before the Chief Justice in support of the request. The request was granted

and a special grand jury convened in Suffolk County on January 27, 1964.

(i) The special grand jury was brought into existence for the singular purpose of hearing only so-called "Crime Commission cases", which in every substantive respect are similar to ordinary criminal cases alleging like offenses.

(j) Although empowered by statute only "to hear, consider and report", the special grand jury returned numerous indictments, some on February 15, 1964, and the remainder on May 8, 1964, under some of which the petitioners are presently being prosecuted. The special grand jury was the only such grand jury in the history of the Commonwealth of Massachusetts ever to have returned indictments. Between January 27, 1964, and May 8, 1964, the special grand jury sat simultaneously with the regular grand jury in Suffolk County.

(k) In the selection of special grand jurors, all non-registered voters were intentionally and systematically excluded by administrative action of the City of Boston officials and numerous categories of persons otherwise qualified were intentionally and systematically excluded with the result that the special grand jury did not represent a fair cross-section of the community, unlike the composition of other grand juries of other counties, which are drawn in compliance with state law.

(l) Contrary to express provisions of state law, members of the Boston Police Department questioned some of the special grand jurors after they had been selected as veniremen, relative to their qualifications for jury service. The questions in this instance included inquiries relative to the general subject of public officeholders. (The questioning of jurors by police has, since these indictments, been stopped in Suffolk County, as the result of the petitioners' objections.)

(m) For the prosecution of the cases before the special grand jury, a further special procedure was devised by agreement between Brooke and Gardner. After numerous discussions between the two, it was agreed in December, 1962, that the lawyer-investigators for the Commission might present evidence to the special grand jury. In general, the effect of this agreement was to let Commission personnel manage cases through the grand jury stage. The Commission thereupon voted formally to refer the matter to the Attorney General. Accordingly, on January 24, 1964, Brooke purported to appoint Simonds as special assistant Attorney General for the special purpose of handling these Crime Commission cases and, on January 27, 1964, Simonds was sworn and immediately assumed the presentation of the small-loans cases to the special grand jury which had just been convened.

(n) Thereafter, during the sitting of the special grand jury between January 27, 1964, and May 8, 1964, Simonds retained at his private law office, some of the evidence he had assembled at the Crime Commission, and was further assembling by hearings being conducted by him for the Crime Commission, and contemporaneously appeared before the special grand jury, presented such testimony and evidence, and interrogated before the special grand jury the witnesses whom he perviously had questioned as investigator for the Commission.

(o) During his service as a purported special assistant Attorney General between January 27, and May 8, 1964, Simonds continued to be employed by the Commission and paid out of its legislative appropriation. Only those of the Commission's attorneys who accepted appointments as special prosecutors were retained by the Commission until its expiration; the employment contracts of all others were terminated prior thereto. Simonds' compensation during this period was for work done in connection with the small

loans case, of which Simonds continued to be in charge. Such compensation was paid for the time spent preparing evidence for presentation to the special grand jury. The moneys so paid were in every case remitted to Simonds' law firm, from which he continued to receive his regular compensation.

(p) At times during the special grand jury sitting, Simonds revealed testimony given by witnesses before the special grand jury to a police officer who was an investigator for the Commission, permitted grand jury records to be kept in the charge of a Commission employee, and revealed the testimony of prior witnesses to prospective witnesses in order to induce and compel them to testify for the Commission before the special grand jury. Simonds had control over the grand jury exhibits and evidence, much of which was kept in his private office.

(q) Prior to the conclusion of the testimony before the special grand jury and without its prior request or permission, Commission personnel selected the crimes to be charged and those persons to be named as defendants, as well as those to be named only as co-conspirators, and prepared indictments accordingly. Thereafter, at the conclusion of the testimony, these indictments were presented to the special grand jury, and, without exception, voted by it precisely as presented.

(r) 129 indictments in 249 counts, involving 7 co-conspirators and 32 defendants, 10 of whom were corporations, were submitted to the special grand jury for vote on May 7 and May 8, 1964. During the voting, five prosecutors, including the Attorney General and Simonds, were present, being seated at a table parallel to and opposite the jurors and votes were taken in their presence and sight. No request had been made by the special grand jurors or any of them for any prosecutor to be present. During the submission of indictments, specific references were made by

prosecutors to evidence previously given during the presentation of evidence.

13. Under Massachusetts criminal procedure, applied to its citizens not marked for prosecution by the Massachusetts Crime Commission, the special prosecutorial procedues and devices enumerated above are not employed. All such practices used against these petitioners were special, unique, and violative of the legal guarantees which Massachusetts accords in grand jury cases. Because of the foregoing, the petitioners have been subjected to unique and discriminatory treatment in the investigation and prosecution of their cases, have been treated in a manner unlike other citizens of Massachusetts and have not been afforded equal protection of the laws of Massachusetts, and are being subjected to punishment, pains, and penalties unlike those to which other citizens of Massachusetts are subjected, all in violation of the petitioners' rights under the equal protection and privileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States and the rights guaranteed to the petitioners under the laws of the United States providing for the equal civil rights of citizens of the United States.

14. Petitioners have diligently sought state court relief from the matters complained of:

(a) The indictments herein were returned on May 8, 1964, and, on July 31, 1964, the petitioners filed pleas in abatement directed against the unique prosecutorial role of the Massachusetts Crime Commission, as hereinabove set forth.

(b) Arguments were held and briefs duly submitted to the trial court in January and February, 1965.

(c) Commencing in September, 1965, decisions were filed denying petitioners' pleas and, by mid-December, 1965, the court had denied all of petitioners' pleas.

(d) In mid-December, 1965, at the suggestion of petitioners, the court requested all defendants to select those issues which they contended were ". . . so important or doubtful as to require the decision of the Supreme Judicial Court thereon before trial, in the interest of justice . . . ." (Mass. G.L. c. 278, § 30A, allowing a report to the Supreme Judicial Court in the discretion of the trial judge), and asked the Attorney General to indicate whether he would assent to such a report.

(e) It was not until March 8, 1966, that the Attorney General made known his opposition to the report, whereupon March 11, 1966, petitioners filed their formal request for report. Arguments were held and briefs submitted thereon on March 15, 1966.

(f) On March 25, 1966, the trial court denied the requested report and, in the same order, set trial for April 25, 1966 (Later changed to May 2, 1966).

(g) On March 29, 1966, a petition for writ of error on the matters in abatement was presented to a single Justice of the Supreme Judicial Court. After hearing and submission of briefs, the petition was dismissed on the grounds that no sentence had been imposed upon any petitioners on April 14, 1966.

15. On or about April 18, 1966 a petition for a writ of mandamus was filed to compel those Suffolk County officials responsible for the selection of the venire of jurors from which a petit jury will be impannelled, to try the subject indictments, to select said venire in accordance with the statutes of the Commonwealth of Massachusetts and in accordance with the practice of counties other than Suffolk county, (The current Suffolk venire having been selected in the manner set forth in paragraph 12 (k) of this petition). On or about April 29, 1966 the petition was denied.

WHEREFORE, the petitioners pray that this Court retain

jurisdiction of the causes now before it and order that the prosecution of the indictments proceed herein as if originally returned within the jurisdiction of this Court and order the indictments herein abated and dismissed.

By their Attorneys,

(s) EDGAR L. KELLEY
Attorney for
John M. Farrell

(s) WILLIAM C. MADDEN
Attorney for
Francis T. Glynn

(s) FREDERICK J. DOYLE, JR.
Attorney for
Gordon J. Thomasch

(s) FREDERICK J. DOYLE, JR.
Attorney for
Robert N. Winston

(s) FREDERICK J. DOYLE, JR.
Attorney for
Calvert I. Bean

(s) FREDERICK J. DOYLE, JR.
Attorney for
Wilbur A. Bean

(s) JAMES W. KELLEHER
Attorney for
Edward R. Newhall

(s) DANIEL B. BICKFORD
Attorney for
DeWitt J. Paul

(s) GEORGE LEWALD
Attorney for
Vincent E. McDonnell

(s) FREDERICK J. DOYLE, JR.
Attorney for State Loan
and Finance Corporation

(s) FREDERICK J. DOYLE, JR.
Attorney for State Loan
and Finance Management
Corporation
(s) GEORGE J. LEARY
Attorney for
Beneficial Finance Co.
(s) GEORGE LEWALD
Attorney for Seaboard
Finance Company

VERIFICATION

Boston, Massachusetts May , 1966

I, Edgar L. Kelley, upon oath say that I am one of the attorneys for petitioners and that I have read the foregoing petition and the facts contained therein are true to the best of my information, knowledge and belief.

EDGAR L. KELLEY

Subscribed and sworn to before me this day of May, 1966.

Notary Public
My Commission expires:

CERTIFICATE OF SERVICE

Commonwealth of Massachusetts
Suffolk, ss. May 6, 1966

I, Edgar L. Kelley, a member of the Bar of this Court and one of the attorneys of record for the petitioners, hereby certify that on May 6, 1966 I served copies of the foregoing Petition for Removal of Criminal Prosecutions on the Clerk for Criminal Business of Suffolk County and the Attorney General, Edward W. Brooke, by causing copies of the same to be delivered to Clerk for Criminal Business of Suffolk County, Court House, Pemberton Square, Boston, Massachusetts, and Attorney General's Office, Criminal Division, 18 Tremont Street, Boston, Massachusetts.

EDGAR L. KELLEY

Appendix C

MOTION TO REMAND

Now comes the Commonwealth and moves the Court to remand this cause to the Suffolk Superior Court, from which Court it was attempted to be removed to this Court for the reasons and upon the grounds hereinafter set forth:

1). The petition on its face does not state a cause for removal;

2). The petition does not allege a denial of or an inability to enforce civil rights.

WHEREFORE, the Court prays that this cause may be remanded to the Suffolk Superior Court, there to be proceeded with according to the practice governing such cases.

Respectfully submitted,
EDWARD W. BROOKE,
Attorney General
By: BRIAN E. CONCANNON
BRIAN E. CONCANNON

Appendix D

ORDER TO REMAND

SWEENEY, D. J. After hearing on Plaintiff's Motion to Remand and in accordance with the Memorandum of the Court dated June 2, 1966, it is hereby

ORDERED The petitions to remove are denied for lack of jurisdiction in this court, and the cases are remanded to the Superior Court of the Commonwealth of Massachusetts.

By the Court,
F. J. AHERN
Deputy Clerk

GEO. C. SWEENEY
United States District Judge
6/3/66

Appendix E

MEMORANDUM

June 2, 1966

SWEENEY, D. J. These two petitions for removal of the above cases to the Federal court for trial or dismissal are based upon 28 U. S. C. S 1443(1). The Attorney General of the Commonwealth has filed a motion to remand on the ground that each of the petitions on its face does not state a cause for removal and because the petitions do not allege a denial of, or an inability to enforce civil rights. This raises a question of this court's jurisdiction.

The petitions contain general, vague, and conclusory assertions of discrimination against these petitioners in the Commonwealth and its courts. They do not conform to 28 U. S. C. S 1446, which provides that a defendant or defendants desiring to remove a criminal prosecution from the State court to this court shall file a "short and plain statement of the facts which entitle him or them to removal . . . ." Neither do they conform to Rule 8(a) of the Federal Rules of Civil Procedure to the same effect. Both petitions were assigned for an evidentiary hearing on May 25, 1966, and counsel were requested to provide the court with a detailed, particularized statement of the claim for removal or something in the nature of a trial brief. None were offered. When the cases were called for hearing, the petitioners chose to produce no evidence although ordered to do so by the court.*

When the hearing terminated on May 25 without any evidence having been offered, the court requested counsel to file requests for rulings of law. None were filed. In view of the vagueness of the petitions, and the lack of any

*Counsel for Petitioners, at the hearing before Sweeney, D. J., rested without introducing evidence, citing *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 97-98. See Transcript of that hearing (App. 46-49, 53).

evidence to support them, briefs which have been filed are not helpful. The suggestion that the court reserve its decision pending a decision in *Rachel* v. *State of Georgia* is rejected.

The comity which exists between the courts of the Commonwealth of Massachusetts and a Federal court sitting in Massachusetts should not be disturbed except on a clear-cut claim or claims of violations of a constitutional or Federal statutory right. Otherwise, great confusion and delay may result particularly where an allegation of violation of a Federal right might be asserted merely for the purpose of delaying the State court proceedings.

Taking each of the petitions as true on its face but peering behind the window dressing, these petitioners challenge the constitutionality of the Crime Commission Act, and particularly challenge that portion of the law which empowers the Commission to present evidence to a grand jury. They challenge the appointment by the Attorney General of Massachusetts of an Assistant Attorney General and some of his activities down to the details of his compensation and where he kept official records overnight.

A review of these challenges shows that the petitions do not contain an averment that the evidence gathered by the Crime Commission was introduced to the grand jury by a member of the Crime Commission but, on the contrary, shows that an Assistant Attorney General appointed by the Attorney General of the Commonwealth presented the evidence to the grand jury. The propriety of the appointment of the Assistant Attorney General to handle these matters is not open in a civil rights proceeding nor in an allegation of violation of the due process clause of the Fourteenth Amendment. In any event these challenges have been presumably raised in the State court proceedings and decided adversely to these petitioners. Their rights to appeal from such decision presumably have been preserved

and will be given consideration by the highest court of the Commonwealth.

The petitioners next complain about the correct usage and practice encompassed in the trial of criminal cases in the Commonwealth, seeming to infer that the criminal practice in the Commonwealth is outmoded and archaic, and does not suit the modern trend of the law. Of course, every criminal defendant would prefer not to have been indicted and would prefer an early termination of the life of the indictment, preferably by dismissal. That is what they have asked for in their petitions.

But the petitions do not show that the defendants have been denied or cannot enforce in the courts of the Commonwealth a right under any law providing for the equal civil rights of citizens of the United States. What they are really seeking, and are not entitled to, is a pretrial of the law applicable to their cases in advance of a hearing in the State courts where all of their rights have been or can be protected.

The petitions to remove are denied for lack of jurisdiction in this court, and the cases are remanded to the Superior Court of the Commonwealth of Massachusetts.

Appendix F

TRANSCRIPT OF HEARING — BEFORE SWEENEY, D.J., MAY 25, 1966 (R. 129-140 INCL.)

[R:129] The Clerk: Criminal No. 66-113 and 66-114, United States v. Martin Hanley, Jr. and United States v. John M. Farrell Et Als.

Mr. Travers: Your honor, I requested permission of the Court to appear in the other matter, similar in nature, involving Nathaniel Barber and Household Finance, and I would request the Court's permission in these matters on behalf of the Commonwealth, and also for James Krasnoo who is with me, and ask that we be allowed to appear in this matter although not members of the bar of this court. My name is Herbert F. Travers, Jr.

The Court: All right. Now, I think I would like an opening from the defendants.

Mr. Kelliher: May it please the Court, my name is James Kelleher. I filed an appearance this morning for the defendant Newhall in case No. 114, and I have been asked to make such an opening presentation as may be necessary in that case.

Before I do so, I think I ought to call to your Honor's attention a case which we found yesterday afternoon, and which we called to Mr. Traver's attention within the last hour and I am not sure that Mr. Travers has had a chance to even read the case.

The case is Wilson v. Republic Iron and Steel Company, 257 United States 92.

[R:130] I may say before I deal with this case that counsel for the defendants in this last removal case very diligently tried to cope within the last ten days with the problems of trying to find out what issues there were, what issues required presentation of evidence.

And on the whole, if your Honor please, it is a very un-

satisfactory problem principally because of the state of the pleadings.

And that is why I am calling this case to your Honor's attention.

What we have here is a motion to remand which as we read it goes to the face of the pleadings and does not dispute any factual allegations made in the petition.

Now, with that in view, I should like to deal briefly with this Wilson case.

The Court: What is that citation?

Mr. Kelleher: 257 United States 92. And I may say that we have had a chance last night to check on that and there is no later United States Supreme Court case that passes any doubts on it. We believe it states the law.

We have not been able to go through the Court of Appeals cases or the District Court cases, and there are a great many of them.

This is an opinion by Mr. Justice Vandevanter. The case was in the October term.

[R:131] This case was a civil removal, but the defendant—the action was an action by an employee against an employer and a co-employee—

The Court: Was it removed under this statute, or was it removed because of diversity?

Mr. Kelleher: This was a removal because of diversity.

The Court: I see.

Mr. Kelleher: I think this case is squarely in point here because of the way in which the Court treats this matter. The Court says: (reading)

> "Shortly after the removal, the plaintiff filed in the district court a motion to remand to the state court. This motion challenged the jurisdiction of the district court on the grounds that one of the defendants, the co-employee, was a citizen in the same state as the

plaintiff and that the removal was taken for the purposes of delaying the trial of the cause. But the plaintiff''—

This is what the Court says now—

"But the plaintiff did not by the motion or in any wise traverse or take issue with any of the allegations of the petition for removal".

Now, later in the opinion the Court deals with that situation. I am reading now from the Court's opinion on page 97—

[R:132] The Court: Well, Mr. Kelleher, if all you are trying to prove to me is that the bill as filed, without an answer, must be taken as true, then I agree with you.

I will go further and say that the motion to remand might be treated as a demurrer if we still had it here.

Mr. Kelleher: Well, it will take only a short time, your Honor.

The Court: Go right ahead.

Mr. Kelleher: The Court says this: (reading)

"If the removal is effective, the plaintiff may by a motion to remand, plead or answer, take issue with the statements in the petition. If he does, the issue so arising must be heard and determined by the district court, and at the hearing the petitioning defendant must take and carry the burden of proof, he being the actor in the removal proceedings.

"But if the plaintiff does not take issue with what is stated in the petition, he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it."

Now, at this point the Court cites a criminal removal case under Section 1443, Kentucky v. Powers, 201 United States, at page 1.

Now, I suggest to your Honor that the situation here [R:133] is this—

The Court: Let me have that Powers citation.

Mr. Kelleher: 201 United States 1 at 34.

The situation here today is this, your Honor, we have prepared for the hearing on the facts, we have drafted tentatively some stipulations. I don't think Mr. Travers has had much of a chance to examine these although he has seen drafts of them, I think.

We would also wish to call some witnesses. There are witnesses, in fact, one of those witnesses, Mr. Simonds, is presently on trial in the Suffolk Superior Court in a criminal proceeding and will not be available for the rest of this week as I understand it.

But, more fundamentally than that, your Honor, as a trial lawyer, I find myself faced with this diffieulty: Am I to put in proof to establish facts which on the pleadings are admitted and I have a great reluctance to do so. I don't think we should be called upon to do so at this point. We are willing to rest on this petition and have your Honor decide this matter on the basis of a motion to remand.

We think the facts are established. We, if Mr. Travers wishes, will file some proof or answer which would take issue with the petition, I suppose it would have to do so by [R:134] admitting parts of it and denying other parts of it, setting up affirmative facts, perhaps. We don't oppose his right to do that, but we suggest to your Honor that this case, in its present posture, is not and ought not to be treated by introduction of evidence. There are no issues upon which to introduce evidence.

The Court: Mr. Kelliher, that leaves the Court in a strange position because—can we call the other cases the Household cases?

Mr. Kelliher: Yes, your Honor.

The Court: In that case they requested an evidentiary hearing.

Mr. Kelliher: I understand that.

The Court: I assume that you wanted that.

Mr. Kelliher: I don't think we are in a position where we are required to make any such demand and we do not make such demand.

The Court: I won't let this matter go over on technical pleadings.

In every action in this Court, the jurisdiction of the Court must be shown on the face of the complaint.

Mr. Kelliher: Yes, your Honor.

The Court: Now, these petitions, and I now refer to [R:135] all of them, household and yours, are so general they do not show any violation or claim violation of constitutional rights or a violation of some Federal statute that provides for your protection. That is why I have suggested, that I have offered a Bill of Particulars. I have suggested what I would like is a trial brief, but I waive those things. I am coming now to the point that we are here about, that is why I want you, in your opening, to make an offer of proof of how your clients, their specific constitutional rights have been violated because from the face of the complaint I can't see anything except a lot of general statements and conclusions. So, you are now in a position or you place the Court in a position which is extremely delicate, one group demanding evidentiary evidence, your group not wanting it.

Mr. Kelliher: May I comment on that or make a suggestion?

The Court: Yes.

Mr. Kelliher: In the first place, I would like briefly to comment about your Honor's remarks about the generalities of these pleadings. I think to a large extent it is justified. I should say, your Honor, however, that the petition is molded or the petition in certain cases, one in particular, in the Fifth Circuit, the Rachel case, I think it necessary

[R:136] on our own motion to remand, I could demonstrate to your Honor that this petition is as good or as bad as the petition in the Rachel case. We have a feeling that that case, as your Honor knows, was argued before the Supreme Court of the United States about a week or two weeks ago. I have read the account of that argument.

From what small familiarity with these matters I have acquired in the course of this litigation in the past couple of years, I am rather confident that the Supreme Court will support the decision in the Rachel case. If they do so, I think they necessarily support the adequacy of the petition here as a pleading. Therefore, I am confident to rest on its adequacy, the pleadings.

I may be wrong, I have been wrong many times before, but so far as the question of pleadings goes, I am willing to rest this matter on the adequacy of this petition as it stands.

Now, if some parts of the petition are controverted by a plea to the jurisdiction or by an answer, that would change the situation, of course, and then we would have to prove by evidence, by stipulation or in some other manner the dispute in fact. But, that is not the case here. Therefore, we have made no demand for a hearing and we make [R:137] no demand because in our opinion, no such demand is yet required of us.

Now, your Honor, may I suggest something a little further. The cases which are here, the cases which are in the Court of Appeals, involve, to a large extent, the same indictments. They involve fifty indictments which were set for trial together by the State Court.

In our view, it would be a great misfortune if those indictments were now, by some action of this Court or of the Court of Appeals, severed and taken apart. We think it would be most unfortunate if that were to occur. We have clients to whom we must answer to and the clients have

able general counsel who wish to know what is happening here. We think it would be very unfortunate if within the next month or two a situation were brought about with some defendants in this group of indictments that were to be tried together are back in the State Court and others are in the Court of Appeals or on their way to the United States Supreme Court. That, may it please the Court, should not happen.

The Court: Therefore, counsel for Household, could they not have moved to have their appeal withdrawn?

Mr. Kelliher: May I make another suggestion, your [R:138] Honor?

We have, of course, no control over counsel for Household. They have their view of their case, I am not challenging their good faith or their right to pursue. I am asking for the right to pursue my view in my case, but I make this suggestion to the Court. I have read the brief which has been filed in that case. That brief terminates, as it must terminate, under the rules of the Court of Appeals with a request for the relief asked for. The only relief asked for is a remand to this Court for an evidentiary hearing.

Now, I wasn't here at a number of the conferences that have occurred previously. I have carefully read the transcripts of those conferences and unless I am greatly mistaken, your Honor has more than once said that you felt that you had perhaps acted erroneously in not giving those people an evidentiary hearing, that they ought to be back here now for one. I think you have said that to the Attorney General and I will now—

The Court: I am surprised that I confessed error. I might have suggested that I had a change of heart.

Mr. Kelliher: I am going to suggest that this whole problem might be resolved if someone else confessed error, [R:139] the Attorney General. All that is needed, as I see it, and this happened in a case that was reported in this morning's newspapers in Washington. The Attorney Gen-

eral of the United States came in and said, "We made a gross mistake with this man", I think his name is Mr. Black, "We wire-tapped his room. Of course, we didn't get anything that has anything to do with this case, but we think the case ought to go back to the lower court for a hearing on just what we did get by our illegal wiretapping. We confess error, send it back."

I suggest, your Honor, that is the simple solution of this difficulty here. I don't see how Household Finance can properly object to it because it gives them exactly the relief asked for in their petition.

The Court: Well, I am going to rule now that in the posture of these cases I am going to call for such evidence as the defendants have that would show to this Court, that this Court has jurisdiction to entertain these cases for trial.

Now, as I have stated in many cases, this case has to have, on its face, jurisdiction. I have read the complaints, there is nothing, they are too general to be able to pinpoint any complaint.

[R:139] So, I would like such evidence as you can offer, I would first like an opening so that I know what we are doing here as to what rights have been violated and how.

Mr. Kelliher: Your Honor then is ordering us to immediate hearing?

The Court: Yes.

You set this down for an evidentiary hearing. I say to you that your Bill of Complaint on its face does not show sufficient evidence in specific detail as to warrant this Court continuing these cases so that any evidence that you are now going to present that will amplify or pinpoint—pinpoint is probably the better word—your claims for right of removal, I will now hear you.

Mr. Kelliher: If your Honor please, with all due respect to the Court, we have no evidence to offer. We stand on the petition and the pleading.